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FEDERAL EMPLOYERS' LIABILITY ACT OF 1908 AS REGULATION OF INTERSTATE COMMERCE. — The regulation of commerce is one of the many topics which are subjected by the federal Constitution to the control of a dual sovereignty. Primarily the alteration of the laws governing commercial intercourse is a branch of the police power of the several states.[1] Yet the national Congress is, by the Constitution, empowered to exercise its police power over the same general subject matter with this limitation, that it must confine its exercise solely to such regulation as has some substantial connection with commerce between the states and with foreign nations.[2] With this general principle in view, it would seem that the constitutionality of federal legislation on this subject is dependent almost wholly on a question of fact: May such substantial connection be discovered?

This connection has been discovered in a vast variety of circumstances. It was decided at an early date that Congress could forbid all foreign commerce as a measure of war;[3] and that an act that interfered with interstate and foreign commerce could be made an offense against the United States, in spite of the fact that it was an act which was also subject to the police power of the states.[4] And it is equally clear that Congress does not exceed its powers when it prohibits the carriage of certain

[1] City of New York *v.* Miln, 11 Pet. (U. S.) 102. See Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1.

[2] *In re* Debs, 158 U. S. 564, 15 Sup. Ct. 900; Patterson *v.* Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821. See Gibbons *v.* Ogden, *supra*, 196; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 856.

[3] United States *v.* The William, Fed. Cas. No. 16,700.

[4] United States *v.* Coombs, 12 Pet. (U. S.) 72.

articles in interstate commerce,[5] or prescribes the terms and liability under which a common carrier shall transport goods from state to state.[6]

That certain relations between employer and employees engaged in interstate commerce have some substantial connection with the conduct of this traffic and may be regulated by Congress, is well settled. The Safety Appliance Act of 1893 has been upheld in numerous decisions. The courts have taken notice that the interests of interstate commerce require that the lives and limbs of persons so employed be protected by the use of less dangerous instrumentalities of transportation.[7] So too have they recognized the benefits accruing from the regulation of hours of employment,[8] and restrictions on the payment of wages.[9]

In ascertaining whether there is any substantial connection between the operation of a statute and interstate commerce, as in deciding other constitutional questions, the only source of information on the subject matter is the judicial knowledge of the court; and accordingly the diversity of the decisions on these questions must be attributed to the differing attitudes of the courts on complicated matters of fact.[10] In the Employers' Liability Cases[11] the Supreme Court was unable to discover that interstate commerce was benefited by placing an unusual liability on a carrier, simply because it was engaged in interstate commerce to some extent, and therefore the court declared the act of June 11, 1906, unconstitutional. The decision in the Adair Case[12] is another illustration of the same principle, and may also be criticized as evincing a slightly limited knowledge of the actual situation.[13] In the recent cases under the Employers' Liability Act of 1908[14] the Supreme Court has taken a liberal view of the situation presented. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169. In upholding the constitutionality of the act, the court, in effect, decided that interstate commerce was beneficially affected, by imposing on common carriers an extraordinary liability to their employees for injuries suffered while engaged therein, even though the source of the injury were some agent of intrastate commerce. Aside from the general principle stated *supra*, it is difficult to discover in this decision more than a declaration of the court's judicial knowledge of matters with which the statute is concerned.

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[5] Champion *v.* Ames, 188 U. S. 321, 23 Sup. Ct. 321.

[6] Atlantic Coast Line *v.* Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164.

[7] Southern Ry. Co. *v.* United States, 222 U. S. 20, 32 Sup. Ct. 2; Wabash R. Co. *v.* United States, 168 Fed. 1.

[8] Baltimore & Ohio R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621.

[9] Patterson *v.* Bark Eudora, *supra*.

[10] *Cf.* People *v.* Lochner, 177 N. Y. 145, 69 N. E. 373, and Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539.

[11] 207 U. S. 463, 28 Sup. Ct. 141. The act, 34 U. S. STAT. AT LARGE, 1906, 232, applied to all employees of a carrier engaged in interstate commerce, whether the employee was so engaged or not.

[12] Adair *v.* United States, 208 U. S. 161, 28 Sup. Ct. 277. The act, 30 U. S. STAT. AT LARGE, 1898, 424, c. 370, § 10, made it unlawful to discharge an employee engaged in interstate commerce for being a member of a labor union.

[13] See the dissenting opinion of McKenna, J., in Adair *v.* United States, 208 U. S. 161, 185 *et seq.*, 28 Sup. Ct. 277, 285 *et seq.*

[14] 35 U. S. STAT. AT LARGE, 1908, 65, c. 149. This statute, unlike the Act of 1906, applied only to injuries received while engaged in interstate commerce.